NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GERMAN LOPEZ-MAGALLON, Defendant - Appellant.	No. 05-50427 D.C. No. CR-04-02660-BTM MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Submitted May 3, 2006[**]
Pasadena, California

Before: LAY[***], KLEINFELD, and SILVERMAN, Circuit Judges.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Lopez appeals from his jury conviction and 96-month sentence for violating 8 U.S.C. § 1326.

Lopez attempts to collaterally attack his 1995 deportation on the ground that the Immigration Judge did not inform him that he might have been eligible under former INA § 212(c) for relief from deportation. However, Lopez has no "plausible grounds for relief that might have been available to him."[1] In order to qualify for relief under former INA § 212(c), Lopez would have needed "outstanding equities . . . for discretionary relief" at the time of his 1995 deportation.[2] In the five years before his deportation, Lopez had a drug conviction and four other convictions. He showed no positive equities to overcome this significant criminal history, so he did not establish any "plausible grounds" for relief from deportation in 1995. Thus, he was not prejudiced, as Proa-Tovar requires, by any failure to inform.[3]

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[1] United States v. Proa-Tovar, 975 F.2d 592, 594 (9th Cir. 1992) (en banc).

[2] See INS v. St. Cyr, 533 U.S. 289 (2001).

[3] See, e.g., United States v. Arrieta, 224 F.3d 1076 (9th Cir. 2000).

Lopez next argues that the district court erred by allowing the government to introduce evidence of his 2004 deportation. He argues that this evidence was "bad act" evidence governed by Federal Rule of Evidence 404(b). However, Rule 404(b) is not applicable "where the evidence the government seeks to introduce is directly related to . . . the crime charged."[4] The government must prove beyond a reasonable doubt that Lopez "had been outside the United States" to establish a violation of 8 U.S.C. § 1326.[5] Therefore, this evidence was not "bad act" evidence because it established an element of the crime charged. Also, the evidence came in to rebut defense evidence. The district court was well within its discretion in admitting this evidence.

Lopez's argument that the grand jury instructions used in this case are unconstitutional is foreclosed by United States v. Navarro-Vargas[6] and United States v. Rivera-Sillas.[7]

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[4] United States v. Lillard, 354 F.3d 850 (9th Cir. 2003).

[5] United States v. Romo-Romo, 246 F.3d 1272, 1276 (9th Cir. 2001).

[6] United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005) (en banc).

[7] United States v. Rivera-Sillas, 417 F.3d 1014 (9th Cir. 2005).

Lopez's arguments that § 1326(b) is unconstitutional and that the district court erred by enhancing his sentence pursuant to this statute are equally untenable. Almendarez-Torres v. United States[8] is binding on this Court.

AFFIRMED.

[8] Almendarez-Torres v. United States, 523 U.S. 224 (1998).